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Legal Alert: Amendments to Wage Theft Prevention Act, including Repeal of Annual Wage Notices

New York's Wage Theft Prevention Act (the "Act"), which took effect on April 9, 2011, amended the state's labor laws to increase penalties and strengthen enforcement of laws protecting workers from nonpayment of wages.

On December 29, 2014, New York Governor Andrew Cuomo signed into law a bill (A 8106-C, S5885-B) that amends the state's labor laws, including the Act (the "Amendments"). The key provisions of the Amendments (i) eliminate the annual wage notice requirement and (ii) significantly increase penalties for non-compliance with the Act. Other requirements of the Act, such as written salary notifications to new hires and written notice of pay changes to existing employees, remain in effect and are discussed below.

Notice and Language Requirements

As stated above, the Amendments repealed the portion of the Act that required employers to give specific information about their compensation in writing on or before February 1 of each year. Technically, the amendments do not go into effect for 60 days (i.e., on February 27, 2015), which would make the relief from the annual notice requirement not apply to 2015. However, according to the Governor's signing statement, the legislature has agreed to an amendment as soon as it reconvenes in January to make the repeal effective immediately. In light of this, the Department of Labor has posted on its website a notice that it will not enforce the requirement for 2015.¹

¹ <http://www.labor.ny.gov/workerprotection/laborstandards/employer/wage-theft-prevention-act.shtm> (last visited January 5, 2015). Note that hospital industry employers must still issue new pay notices to their employees earning minimum wage in 2015 and 2016. 12 NYCRR § 146-2.2(b); New York State Department of Labor, Hospitality Industry for Employers: Frequently Asked Questions, available at <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/MW%20Updates/MW%20Hosp%20ER%20FAQs.shtm> (last visited Jan. 5, 2015).

While annual notices will no longer be required, the Act still requires that employers give employees specific information about their compensation in writing within ten business days of their first day of employment and within seven days of any change in the required information that is not reflected in the employee's wage statement. The following information must be given to employees:

- the basis (i.e. hourly, weekly, etc.) for the rate of pay;
- the rate for overtime;
- any allowances such as lodging or meal;
- the employer's legal name as well as any "doing business as" names;
- regular payday designated by the employer as required by law;
- the physical address of the employer's main office and a mailing address if different; and
- the employer's telephone number.

All documentation provided to the employee must be both in English and the employee's identified primary language if it is not English.² The employee must (i) sign and date a written acknowledgement of receipt of each notice received, (ii) affirm that the he/she has identified his/her primary language to the employer, and) affirm that he/ she has received a copy in her/her primary language (or that no template is available in that language). NOTE: In order to avoid potential violations of other laws, employers should not inquire about an applicant's primary language until after a job offer has been made and accepted. Such written acknowledgements must be retained by employers for six years.

Under current law, if an employer fails to provide the aforementioned documentation, within ten business days of the employee's first day of employment, the employee may recover in a civil action \$50.00 a week until the violation is remedied, not to exceed \$2,500.00 for employee-initiated legal action. The employee may also be awarded attorneys' fees. Further, the Commissioner may also bring an action to enforce the notice requirement on behalf of the employee and there were no cap on damages for actions brought by the Commissioner.

Under the Amendments, damages for failure to provide the aforementioned documentation are increased from \$50.00 per work week to \$50.00 per work day that the violations continue to occur, capped at \$5,000.00. Damages available for actions brought by the Commissioner have also increased to \$50.00 per work day. The Commissioner's recovery, previously uncapped, is now capped at \$5,000.00 per violation.

No particular form is required to be used by employers. Employers may create their own forms, or use and/or adapt one of the NYDOL model notice forms located online at: <http://www.labor.ny.gov/formsdocs/wp/LS54.pdf>.

² Until the NYS Commissioner of Labor has developed the notice template in a particular language, employers may give notice in English only.

Recordkeeping Requirements

Under the Act, employers are required to maintain contemporaneous, true and accurate payroll records of employee pay rate information, overtime rate and scheduled payday for at least six years.

Wage Statements

The Act also requires the following information to be provided in employee wage statements:

- the dates of work covered by the wage payment;
- the employee's name;
- the employer's name, address and telephone number;
- the rate or rates of pay and the basis (i.e. whether the employee was paid by the hour, shift, day, week, salary, piece, commission or other);
- gross wages;
- deductions;
- allowances (if any claimed as part of the minimum wage); and
- net wages.

The Act imposes additional requirements for the wage statements of non-exempt employees:

- the regular hourly rate(s) of pay;
- the overtime rate(s) of pay;
- the number of hours worked; and
- the number of overtime hours worked.

Under current law, both employees and the Commissioner may bring legal action against employers for failure to provide such information. Damages include \$100 per week for each week the violation occurs, not to exceed \$2,500 for suits brought by employees, plus costs and attorneys' fees.

Under the Amendments, damages for wage statement violations are increased from \$100.00 per work week to \$250.00 per work day that the violations continue to occur, capped at \$5,000.00 for suits brought by employees and the Commissioner.

Additional Penalty Under the Amendments

For repeat, willful, or egregious violations of the wage laws listed above, among other laws, the employer may be required to disclose certain wage data to the Commission for posting on the New York Department of Labor's website.

Retaliation Claims

The Act protects employees from retaliation in the event that an employee complains about employer conduct allegedly in violation of Labor Law. The Commissioner may assess

civil penalties of up to \$10,000.00 (but not less than \$1,000.00), plus costs and attorneys' fees, to employers that are found to have engaged in retaliation.

To help curb repeat offenses, the Amendments increased the amount of civil penalties by providing that if the Commissioner has found that the employer engaged in retaliation in the preceding six years in addition to the current instance, the Commission may assess civil penalties of up to \$20,000.00 (but not less than \$1,000.00).

Liquidated Damages

Under former law, employees prevailing in a legal action were able to receive only the total amount of the underpayment, costs, attorneys' fees, and in some instances liquidated damages equal to 25% of the underpayment. The Act allows a prevailing employee to recover the aforementioned list, among other things, and liquidated damages equal to 100% of the total wages due. (This is the same amount allowable for violations of Federal wage and hour law.)

Personal Liability on Limited Liability Company Members

The Amendments provide that the 10 members with the largest percentage ownership interest in a New York limited liability company ("LLC") are jointly and severally liable for all debts, wages, or salaries due and owing to the LLC's employees for their services to the LLC. The Amendments require that before any employee may bring a charge against a LLC member, the member must be given 180 days' advance written notice. LLC members are entitled to pro rata contribution from other liable members of the LLC.

Other Provisions

The Amendments also added various other provisions, including ones, that (1) prohibit employers from forming new companies to avoid repeat wage violation liability; (2) require contractors and subcontractors in the construction industry that commit wage violations to notify all employees of the nature of the violations; (3) require that investigations by the Commissioner will be subject to a six-year statute of limitations, except in limited circumstances; and (4) mandate, rather than permit, the Commissioner to assign money that constitutes wages, wage supplements, interest on wages or wage supplements, or liquidated damages to an aggrieved employee for certain violations of the Act.

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